

DOCKET FILE COPY ORIGINAL FILED/ACCEPTED

APR 26 2010

Federal Communications Commission  
Office of the Secretary

PENNSYLVANIA PUBLIC UTILITY COMMISSION

JAMES H. CAWLEY, COMMISSIONER

FOR YOUR INFORMATION



PENNSYLVANIA PUBLIC UTILITY COMMISSION  
COMMONWEALTH OF PENNSYLVANIA  
HARRISBURG, PENNSYLVANIA

LINDA C. TALIAFERRO  
CHAIRMAN

January 21, 1985

TELEPHONE  
(717) 787-4301

RECEIVED

JAN 28 1985

Margaret Wood, Esquire  
Federal Communications Commission  
Room 6206  
1919 M. Street, N.W.  
Washington, D.C. 20554

ENFORCEMENT DIVISION

Dear Ms. Wood:

Thank you for your January 2, 1985, request for information concerning Pennsylvania's regulation of cable television pole attachments.

Pennsylvania does not have cable television pole attachment regulations in effect at this time and hence, pursuant to the provisions of Section 224(c) of the Communication Act of 1934, 47 U.S.C. §224(c), as amended by Section 4 of the Cable Communications Policy Act of 1984, has lost jurisdiction over this area. Such regulations are in the process of being implemented, however, and a copy of these proposed regulations is attached. When these regulations become effective, we will so inform your office.

Sincerely,

  
Linda C. Taliaferro  
Chairman

Attachment

PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg, PA 17120

Public Meeting held August 16, 1978

Commissioners Present:

Louis J. Carter, Chairman  
Robert K. Bloom  
Helen B. O'Bannon  
Michael Johnson  
W. Wilson Goode

RECEIVED BY FCC

AUG 29 1978

MAIL BRANCH

Regulation of rates, terms and conditions  
of pole attachments.

M-78080077

O R D, E R

BY THE COMMISSION:

This Commission has become increasingly aware that the use of electric and telephone utility pole space by cable television systems sometimes called Cable TV is significant. It is our conclusion that an exercise of this Commission's jurisdiction over the rates, terms and conditions of CATV pole attachment rates are equitable and non-discriminatory, and to avoid potential disruption of utility service regulation by this Commission is necessary.

Initially, we note that our jurisdiction is found both under Section 202(e) of the Public Utility, Act of May 28, 1937, P.L. 1053, 66 P.S. §1122(e)<sup>\*/</sup> as amended, as well as under our general regulatory powers over utilities, e.g., Sections 901 and 902 of the Public Utility Law, 66 P.S. §§1341 and 1342,<sup>\*\*/</sup> as amended. In this regard, we also note that utility poles clearly are an essential part of public utility plant, the cost of which must ultimately be recovered from the utility's ratepayer.

Utility revenues received from the use of pole space by CATV operators is taken into account in fixing utility rates, and thereby reduce customer charges. In view of the exclusive position that utilities have in offering pole space, it is appropriate to exercise our jurisdiction over the terms and conditions of agreements for CATV pole attachments, in order to ensure that both CATV and utility customers bear a reasonable share of the costs incurred in the construction and maintenance of utility poles. Further, common use of the same poles that deliver essential utility services, requires regulation to ensure that such use does not interfere with the primary purpose of utility poles.

---

<sup>\*/</sup> §1102 (3) of the Public Utility Code effective August 31, 1978.

<sup>\*\*/</sup> Section 501 + 502 of the Public Utility Code.

Therefore, in view of the fact that this Commission has the power to regulate the rates, terms, and conditions for CATV pole attachment agreements, and in so regulating, can and should consider the interests of CATV users; THEREFORE,

IT IS ORDERED:

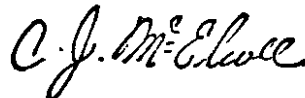
1. That each electric and telephone utility doing business within this Commonwealth, shall, within thirty (30) days of entry of this order file (a) a copy of all CATV pole attachment agreements now in use and (b) any proposed pole attachment agreements which the utility intends to offer to CATV systems doing business within its service territory. Thereafter on or before the 10th of each calendar month any agreement entered into during the prior calendar month shall be filed with the Secretary of the Commission.

2. With regard to guidelines to be followed in determining the reasonableness of the rates, terms, and conditions of pole attachment agreements, written comments may be submitted by all interested persons within sixty (60) days of publication of this order in the Pennsylvania Bulletin to the Pennsylvania Public Utility Commission, Attention: Secretary, P.O. Box 3265, Harrisburg, PA 17120.

3. That the Secretary shall serve a copy of this order upon all parties of record in the proceeding known as I.D. 73--Investigation upon Commission Motion to Inquire Into the Commission's Jurisdiction and Power to Regulate Television Cable Service.

4. That the Secretary serve a copy of this order on the Secretary of the Federal Communications Commission and by separate letter certify that this Commission has asserted jurisdiction over CATV pole attachments.

BY THE COMMISSION,



C. J. McElwee  
Secretary

(SEAL)

ORDER ADOPTED: August 16, 1978

ORDER ENTERED: AUG 23 1978

## Chapter 70. Cable Television Pole Attachments

### §70.1 General.

The purpose of this chapter is to establish rules and regulations implementing the Commission's regulatory authority over cable television pole attachments.

### §70.2 Definitions.

(a) The term "pole attachment" means any attachment by a cable television system to a pole, duct, conduit, or right-of-way owned or controlled by a public utility.

(b) The term "public utility" as used in this chapter means any jurisdictional electric or telephone utility.

### §70.3 Access.

Every public utility shall afford cable television operators the opportunity to make pole attachments pursuant to reasonable terms and conditions and at reasonable rates.

### §70.4 Tariffs.

Public utilities shall establish in their tariffs provisions specifying the terms, conditions and rates governing pole attachments.

### §70.5 Complaints

Any cable television operator dissatisfied with a term, condition or rate imposed by a public utility for pole attachments may file a complaint with the Commission specifying therein why it believes the term, condition or rate to be unreasonable. Final action shall be taken on such complaints within 360 days after the complaint is filed.

RECEIVED

JUL 17 1981

RECEIVED BY FCC

M-78080077

POLE ATTACHMENT

Regulation of Rates, Terms and Conditions  
of CATV Pole Attachments

JUL 17 1981

MAIL BRANCH

DISSENT OF COMMISSIONER JAMES H. CAWLEY

Pole attachment agreements are lease agreements between utilities and Community Antenna Television Systems (CATV) which authorize the systems to use excess utility pole space for the purpose of carrying cable television lines. In the Communications Act Amendments of 1978, Congress granted the Federal Communications Commission (FCC) the authority to regulate these agreements except where a state certifies to the FCC that "such matters are regulated by a State".<sup>1/</sup> In response to this law, this Commission has made clear to the FCC its intention to assume jurisdiction over the rates, terms, and conditions of CATV pole attachments. I respectfully dissent from such a certification for both legal and practical reasons.

The 1978 Commission order asserting jurisdiction over CATV pole attachments was adopted in anticipation of "clarifying" legislation being sought "to reinforce statutory authority over CATV pole attachments and the CATV industry generally."<sup>2/</sup> It served to prevent Federal preemption of Pennsylvania's power to regulate CATV utility pole attachment agreements even though Pennsylvania had not previously been actively regulating such agreements. The Commission's power, under the Public Utility Code, to regulate pole attachments (including CATV pole attachments) by using its traditional powers over the service and

facilities of public utilities was not in question and the scope of the 47 U.S.C. §224 preemption does not appear to make significant inroads into traditional state jurisdiction to regulate service, safety and retail rates of public utilities.

If the 1978 order had been able to stop with the mere assertion that the Commission has the power to regulate CATV pole attachments by exercising its traditional powers to regulate public utilities (and protect public utility customers and the general public) the result would have been easy to justify. However, the Commission was required to take an additional step and assert that it has the authority to consider the interests of CATV subscribers. This requirement is obviously designed to ensure that the forum for utility-CATV disputes can act as a neutral forum capable of balancing utility and CATV interests.

There is precedent for the proposition that the Commission has the power (and duty) to consider the public interest when it makes decisions concerning public utilities, and especially concerning safety of public utility facilities. However, power to consider the general public interest (especially with the precedents generally limited to the question of public safety) does not translate into authority to consider CATV subscriber interests (as a specific separate issue) in proceedings concerning rates, terms, and conditions of pole attachments.

I agree that the assumption of jurisdiction over CATV pole attachments is in the public interest. However, such an analysis merely begs the question. Unless this Commission has

been delegated jurisdiction over a particular activity under its statutory authority, the presence of an affected public interest is irrelevant. While the majority properly recognizes this Commission's interest in the safe maintenance of public utility facilities, it incorrectly assumes that our interest in those facilities and our authority to insure their safe maintenance permits our assumption of jurisdiction over an unregulated industry that uses those facilities. Such an extension of jurisdiction is totally inappropriate and indefensible, absent a change in our statutory authority.

That is not to suggest that we cannot direct public utilities to maintain safe and adequate facilities, or that appropriate remedial action cannot be taken where that direction is ignored, even where that action may affect indirectly the relationship between the utility and the non-regulated CATV industry. In all cases, however, our direction and our remedial action must be directed solely to the public utility.

The best approach to deriving power to consider CATV interests from provisions of the Public Utility Code appears to be the sort of approach used by the United States Supreme Court in Griswold v. State of Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed.2d 510 (1965), where the court considered the First, Third, Fourth, Fifth and Ninth Amendments to the U.S. Constitution and made the following statement:

"The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."

381 U.S. at 484.



The power of the Commission to consider special interests has been reviewed before. It has been rejected. NAACP v. Pa. P.U.C. and Phila. Elec. Co., 5 Pa. Commonwealth Ct. 312, 290 A.2d 704 (1972). In this opinion, the Court concluded, in the context of an appeal from a rate case decision, that the Commission does not have authority to examine a utility's employment practices. In that decision, the Court searched the Public Utility Law, with special emphasis on eight sections cited by the NAACP, and quoted the following language from Swarthmore Borough v. Public Service Commission, 277 Pa. 472, 478-9, 121 A. 488, 489-90 (1923):

"If the commission were allowed to exercise authority not conferred on it, either in specific words or as necessarily comprehended in some other power expressly granted . . . all the contracts and the general management of the business of the public utilities of Pennsylvania might, in course of time, be subjected to the control of that body, although no such condition of affairs was contemplated by the act. In other words, the evil effects of not adhering to the rule, that the authority of all extra-judicial bodies must clearly appear, soon would reach beyond the confines of this controversy and might invade the whole field of public control. The only safe and proper roads for administrative bodies like the present commission to travel are those plainly marked by the acts of assembly defining their duties, and to these the courts must confine them, if the system represented by such commission - to which our body politic seems committed - is to work out as intended by its creators, the legislature.

". . . [B]ut it is for the legislature (and not the courts or the Public Service Commission) to declare the public policy of the state in this regard . . . and, when it sees fit to designate the instruments to

carry out its declarations, neither the courts nor the commission possess the right to expand or abridge a declaration or grant of power so made. The only legislative declarations we have at this time, on the subject at hand, are those contained in the Public Service Company Law . . . . Where authority is conferred on an extra-judicial body, 'not in the course of the common law', the legislative grant of power to act in any particular case must be clear."

5 Pa. Commonwealth Ct. at 320-21.

The central issue in this proceeding (which was not fully and explicitly addressed by the Commission in 1978 or by the Administrative Law Judge in his initial decision) is the question of whether or not the Commission has authority to consider, and does consider, the separate interests of CATV subscribers. Such authority is not explicitly conferred by the Public Utility Code and a reading of the Public Utility Code to include this authority would establish a novel, and perhaps dangerous, precedent.

There are also financial and practical impediments to our assumption of such jurisdiction. This is an area that the Commission is not now regulating, and I do not believe that we now possess sufficient untapped resources to apply to the assumption of jurisdiction over a totally new activity. We would have to refocus some of our existing resources which are not committed to other areas. This is a particularly perilous course, since we have clear statutory direction to regulate existing areas of activity, but not explicit direction to regulate the CATV industry. We are exposing ourselves to a great

deal of criticism or worse if we appear to neglect our clear statutory duties in favor of a regulatory area in which we have no such duties.

In conclusion, the safe maintenance of public utility facilities can be assured under our existing regulatory authority and framework, and we need not attempt to assume jurisdiction over a totally new area in order to protect this aspect of the public interest. The utilities recognize their responsibilities for their maintenance of safe facilities, even insofar as those facilities may be affected by CATV attachments, and until the Legislature has determined it appropriate to assign direct control over the CATV industry to this Commission, our assumption of jurisdiction over that industry is officious, illegal and impractical.

  
James H. Cawley

June 29, 1981

## FOOTNOTES

1. Public Law 95-234, 47 U.S.C. §224(c), states the following:

"(1) Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions for pole attachments in any case where such matters are regulated by a State.

"(2) Each State which regulates the rates, terms, and conditions for pole attachments shall certify to the Commission that -

(A) it regulates such rates, terms, and conditions; and

(B) in so regulating such rates, terms, and conditions, the State has the authority to consider and does consider the interests of the subscribers of cable television services, as well as the interests of the consumers of the utility services. (Emphasis added.)

2. Minute of August 16, 1978, Bureau Agenda No. AUG78-IA-1, transmitting a "Report On Whether The Commission Should Exercise Jurisdiction Over The CATV Industry and the Degree of Such Regulation". Subsequently, House Bill 833, Printer's No. 906, was introduced by Representative Benjamin Wilson on March 26, 1979, but died in committee without being considered (see Attachment "A").

An examination of the definition of a "public utility" found at 66 Pa. C.S. §102 makes it clear that this Commission has not been granted jurisdiction over the activities of CATV systems. As the statute states, jurisdiction is granted over "[a]ny person or corporations now or hereafter owning or operating in this Commonwealth equipment or facilities for: . . . Conveying or transmitting messages or communications by telephone or telegraph or domestic public land mobile radio service . . . for the public for compensation." See, generally, Borough of Scottdale v. National Cable Television Corp., 476 Pa. 47, 381 A.2d 859 (1978).

Thus, CATV systems are not public utilities within the definition that appears in Section 102 of the Public Utility Code. No other state, in which a similar definition of "public utility" applies, has held that a CATV system is a "telephone company", the only arguable classification of public utility that could apply to a CATV system. It is

clear that the majority's ultimate conclusions, in effect, incorporates CATV systems within this Commission's regulatory scheme. Such an incorporation could only be defended if CATV systems were "public utilities" or customers of public utilities. Obviously, insofar as CATV systems utilize the facilities of public utilities for the transmission of their own services, they are not customers of public utilities.

## THE GENERAL ASSEMBLY OF PENNSYLVANIA

## HOUSE BILL

No. 833 Session of  
1979

INTRODUCED BY MR. WILSON, MARCH 26, 1979

REFERRED TO COMMITTEE ON CONSUMER AFFAIRS, MARCH 26, 1979

## AN ACT

1 Amending Title 66 (Public Utilities) of the Pennsylvania  
2 Consolidated Statutes, providing for the regulation of  
3 certain cable television transmission and reception  
4 attachments by the commission.

5 The General Assembly of the Commonwealth of Pennsylvania  
6 hereby enacts as follows:

7 Section 1. Title 66, act of November 25, 1970 (P.L. 707,  
8 No. 230), known as the Pennsylvania Consolidated Statutes, is  
9 amended by adding a section to read:

10 § 1510. Television cable attachments.

11 (a) Definitions.--The following words and phrases when used  
12 in this section shall have, unless the context clearly indicates  
13 otherwise, the meanings given to them in this subsection:

14 "Attachment." Any wire, cable or other apparatus owned or  
15 controlled by a cable company which is placed:

16 (1) upon the above-ground portion of a pole, tower or  
17 other structure owned or controlled by a utility; or

18 (2) in any pipe, duct, conduit, trench, manhole or  
19 similar enclosure owned or controlled by a utility.

1 "Cable company." Any person or corporation, other than a  
2 public utility, which owns, operates or controls facilities for  
3 the transmission by wire of television signals or services for  
4 compensation.

5 (b) Attachment rates, terms and conditions.--Whenever a  
6 cable company and a public utility are unable to agree upon  
7 rates, terms and conditions for attachments requested by the  
8 cable company, the commission shall, upon petition by either  
9 party, establish for the parties just and reasonable rates,  
10 terms and conditions, for the attachments. In establishing just  
11 and reasonable rates, terms and conditions the commission shall  
12 consider the interests of the subscribers of the cable company  
13 as well as the interests of the customers of the utility.

14 Section 2. This act shall take effect immediately.



COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
P. O. BOX 3265, HARRISBURG, Pa. 17120

December 18, 1978

IN REPLY PLEASE  
REFER TO OUR FILE

William J. Tricarico, Secretary  
Federal Communications Commission  
Washington, D.C. 20054  
Attn: James Talens

M-78080077 - Regulation of rates, terms and conditions of pole attachments.

NOTICE

This is to inform you that a prehearing conference on the petition for reconsideration and rehearing filed in the above entitled proceeding by Pennsylvania Cable Television Association and Raystay Company, t/d/b/a TV Cable of Carlisle, is hereby scheduled to be held on Wednesday, January 17, 1979, at 10:00 a.m., in the Commission's Hearing Room No. 1, Ground Floor, North Office Building, Harrisburg.

The presiding officer in this proceeding will be Administrative Law Judge Edward R. Casey, P.O. Box 3265, Harrisburg, PA 17120; telephone (717) 783-5452.

Sincerely,

  
William Shane  
Chief Administrative Law Judge





COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
P. O. BOX 3265, HARRISBURG, Pa. 17120

*Talens*

October 18, 1978

COMMON CARRIER BUREAU  
IN REPLY PLEASE  
FILE

M-78080077

OCT 30 1978

6218

To Whom It May Concern

TARIFFS AND SERVICES  
DIVISION

CABLE  
TV BUREAU

RECEIVED BY FCC  
MAIL BRANCH ON

OCT 19 1978

Regulation of rates, terms and conditions of pole attachments.

Dear Sir:

This is to advise that at the public meeting held September 21, 1978, the Commission granted the Petition for Reconsideration and Rehearing, submitted by the Pennsylvania Cable Television Association and Raystay Company, t/d/b/a TV Cable of Carlisle.

Very truly yours,

*C. J. McElwee*

C. J. McElwee  
Secretary



COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
P. O. BOX 3265, HARRISBURG, PA. 17120

August 23, 1978

IN REPLY PLEASE  
REFER TO OUR FILE

RECEIVED BY FCC 78080077

AUG 29 1978

MAIL BRANCH

William J. Tricarico, Secretary  
Federal Communications Commission  
Washington, D.C. 20554

Attention: James Talens

Dear Sir:

This is to advise the Federal Communications Commission that the Public Utility Commission of Pennsylvania in accordance with the provisions of Public Law 95-234, amending the Communications Act of 1934, by order on August 16, 1978, asserted jurisdiction over and does regulate the rates, terms and conditions of cable television system pole attachments and in so regulating such rates, terms, and conditions, the Pennsylvania Public Utility Commission has the authority to consider and does consider the interests of the subscribers of cable television services, as well as the interests of the consumers of the utility services, and certifies the above to the Federal Communications Commission.

The said order is hereby attached and enclosed.

Very truly yours,

C. J. McElwee  
Secretary

Enclosure

CJM/JC: jr